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Supreme Court of the United States

October Term, 1981

SANFORD J. BERGER,
Petitioner,

vs.

BERTINE M. BERGER,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

I.

Does the Equal Protection Clause of the Fourteenth Amendment permit disparity of treatment by elected Ohio trial judges who knowingly and intentionally violate the mandatory constitutional, statutory, regulatory and ethical safeguards of our judicial system by optionally affording guaranteed procedural due process rights to some while denying those same guaranteed procedural due process rights to others?

II.

Does a judge, who knowingly and intentionally violates the mandatory ethical, regulatory, statutory and/or constitutional provisions by which he is governed, and which provisions are intended to prevent the denial of justice at the trial level, lose jurisdiction by operation of law disqualification at that moment of knowledgeable and intentional violation, and are his actions thereafter void—making him answerable for violating the constitutional rights of the affected party to whom justice has been denied; or does the Fourteenth Amendment permit the knowledgeable and intentional violation of its protective provisions by judges without immediate relief and sanctions?

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THE OPINIONS DELIVERED BELOW

There was no Opinion rendered herein by the Supreme Court of Ohio. The Journal Entry and Opinion of the Court of Appeals, Eighth Appellate District, Cuyahoga County, Ohio is not yet reported. The four (4) Judgment Entries of the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio, are unreported. A copy of the Court of Appeals Journal Entry and Opinion is appended as A3 to A17, and copies of the four (4) Judgment Entries of the Court of Common Pleas, Division of Domestic Relations are included in sequence from A18 to A22.

JURISDICTION

This petition is presented by petitioner, a practicing attorney, in an effort to make the trial and appellate courts of Ohio comply with the mandatory constitutional, statutory, regulatory and ethical provisions by which they are governed. Petitioner seeks protection in this Court from an order of the Supreme Court of Ohio, entered on March 17, 1982, dismissing petitioner's appeal (A1-A2). By this order, the Supreme Court of Ohio, by its inaction, made final the Journal Entry and Opinion of the Court of Appeals (A3-A17).

In addition, petitioner presents special and important reasons calling for an exercise of this Court's power of supervision over the Ohio trial and appellate courts abandoning of constitutional principles, and the silent disregard thereof by the Supreme Court of Ohio.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL, STATUTORY, REGULATORY AND ETHICAL PROVISIONS INVOLVED

The federal constitutional provisions involved are the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

The Ohio constitutional provisions involved are Article I, Secs. 1, 2 and 16, and Article IV, Sec. 5 of the Constitution of the State of Ohio.

The Ohio Revised Code Section involved is Sec. 3.23.

Ohio Supreme Court Rules for the Government of the Bar: Rule IV(1).

Ohio Supreme Court Rules of Superintendence: Rule 4.

Ohio Code of Judicial Conduct: Canon 2(A) and Canon 3(A)(1) and (4).

Rules of Court of Common Pleas, Cuyahoga County, Ohio: Rule 15.

All of the above are contained in the Petition or Appendix; set forth verbatim or in pertinent text.

STATEMENT OF THE CASE INCLUDING THE RAISING OF THE FEDERAL QUESTIONS

Petitioner first approached this Court in *Berger v. Berger*, Case No. 79-1169, wherein he asked the question:

> "Does an intermediate Ohio appellate court that ignores and avoids the doctrine of *stare decisis* in matters involving its own precedents, statutory procedure, and property rights, thereby treating each appellant dif-

ferently, deny to an appellate litigant the equal protection of the law and permit the taking of his property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

In Case No. 80-6886, *State ex rel. Lesher v. Kainrad et al.* (1981, 65 Ohio St. 2d 68), he again asked this Court to compel the Ohio judiciary to abide by their oaths of office and dispense evenhanded justice, instead of expedient or accommodating justice.

The minority members of our Ohio Supreme Court refer to the practices petitioner complains of as "revolving door justice". *Shroades v. Rental Homes*, 68 Ohio St. 2d 20, 29 (1981) and *Ady v. West American Ins. Co.*, 69 Ohio St. 2d 593, 603 (1981).

Rule 4 of the Supreme Court Rules of Superintendence for the Court of Common Pleas (A28) and Local Rule 15 of the Court of Common Pleas, Cuyahoga County, Ohio (A32) mandate that when a case is filed it shall be assigned by lot from a sealed deck of judge's names within the sole control of the Clerk of Courts. Once assigned, only the assigned judge has the sole and exclusive power to make orders affecting the enjoyment of life, liberty and property of the litigants. Actions by another judge are an intrusion into and a usurpation of the authority of the assigned judge.

The instant case was filed on December 3, 1975 and assigned to Judge Whiting; but without legal authority, Judge Maxwell in 1977 made an order granting petitioner's wife a divorce and awarding her all the marital assets approximating $250,000.00, leaving the petitioner insolvent. That action was the subject of the appeal to this Court in Case No. 79-1169.

On October 30, 1980, and while Judge Whiting was still the assigned judge, a hearing was scheduled before Referee Purcell, on an order of reference from Judge James Celebrezze. Petitioner was advised of the hearing by his attorney of 1977, who had received a card from the Court advising that a "Motion: Miscellaneous" was to be heard, although there were four motions of both petitioner and his wife that had been unresolved. From the filed Transcript of the hearings of October 30, 1980 on pages 4-6:

> The Referee: Are you ready to begin now?
>
> Mr. Berger: No, I'm not sir. There are, according to the journal in this matter, three motions to show cause by the Plaintiff, one motion to show cause by the Defendant. There were two purported judgment entries and a judgment nunc pro tunc. There is a brief of the Defendant in opposition to the motions which has never been ruled upon.
>
> With respect to this pseudo hearing of this morning the Defendant has received no notice. He is not aware of the charges that have been made against him. He has not been served with any motion to show cause. He is totally unaware of which judgment he supposedly is in violation of and this is a denial of due process of law as guaranteed to the Defendant by Section 16, Article I of the Ohio Constitution and Section 1 of the Fourteenth Amendment to the Constitution of the United States.
>
> The Referee: * * * The record further should reflect that we are here this morning to proceed on a motion to show cause filed by the Plaintiff on April 3, 1978, and a motion to show cause filed by the Plaintiff on September 15, 1978.

Mr. Berger: Let the record show that I do not have record of those motions. That those were filed more than two years ago, more than two years ago, and that this is a denial of due process of law.

The Referee: Are you ready to proceed now?

Mr. Berger: I would ask you also, sir, when your report is filed, which judge will make the determination?

The Referee: Judge Celebrezze.

Mr. Berger: For the record, the assigned judge in this matter is Judge Whiting. There has never been any entry, whatsoever, wherein Judge Whiting of record has disqualified himself and that any order of reference to this Court must emanate from Judge Whiting and not from Judge Celebrezze.

The Referee: Are you ready to proceed now?

Mr. Berger: I cannot proceed because this hearing is totally illegal, sir.

The Referee. We will proceed. Proceed, Mr. Eisenberg.

The syllabus of the Court of Appeals' Opinion states that an aggrieved party must object at the first opportunity (A5). For what purpose? To prolong the charade and increase expenses?

Referee Purcell then prepared the Report *and his Journal Entry* and filed the Report on November 14, 1980.

On November 28, 1980, petitioner timely filed his Objections to the Report raising the federal questions on page 1 and in his attached affidavit, and advising Judge Celebrezze that he had no authority to make an order in this matter, while simultaneously filing his Motion to Vacate the void judgments of Judge Maxwell (made in 1977) with

Judge Whiting—complaining to Judge Whiting that Judges Maxwell and Celebrezze had usurped Judge Whiting's authority and that Judge Celebrezze was about to enter an order against petitioner.

On December 11, 1980, Judge Celebrezze, having heard nothing, seen nothing and knowing nothing, signed the Journal Entry of Referee Purcell in violation of Civil Rules 53 and 58 of the Ohio Rules of Civil Procedure. Having been given license to violate these statutory rules by the Ohio Supreme Court in *Lesher v. Kainrad, supra* (see cited Opinion), it is now a common and accepted practice in Ohio Trial courts; and protest, that only an elected judge can determine the rights of an Ohio litigant, is futile (Journal Entry at A19). Petitioner's ex-wife filed her Notice of Appeal from that void order on January 12, 1981; but prior thereto, on December 15, 1980, petitioner filed a Motion For Stay of Execution with Judge Whiting, raising the federal question on page 2 thereof, and again stating that Judge Celebrezze had usurped Judge Whiting's authority.

Before Judge Whiting could rule upon petitioner's previously filed Motion to Vacate, and Motion For Stay of Execution, Judge Sweeney (the administrative judge), without explanation, cause or legal authority, re-assigned the case to Judge Gallagher by Journal Entry of January 21, 1981 (A20). Petitioner filed his Notice of Appeal from that purported Order on February 18, 1981. Since the first Notice of Appeal had been filed in this matter on January 12, 1981, the Trial court had been deprived of jurisdiction thereafter—but no matter.

On January 23, 1981, Judge Gallagher, in an effort to administer *le coup de grace*, filed his void *ex parte* Journal Entry overruling petitioner's Motion to Vacate Judgments and Motion For Stay of Execution (A21). Petitioner filed

his Notice of Appeal from that purported Order on February 18, 1981.

On January 30, 1981, Judge Gallagher, overruled Referee Purcell's Report and filed another void *ex parte* Journal Entry. Without a Referee's Report or a hearing, Judge Gallagher then entered judgment against petitioner for $2,227.38 (A22). Petitioner filed his Notice of Appeal from that purported Order on February 18, 1981.

On February 18, 1981, all four appeals were consolidated by the Court of Appeals on petitioner's motion.

On March 25, 1981, in petitioner's pre-Brief Civil Appeal Statement, he raised the federal question on pages 1 and 3; followed by his Brief on April 22, 1981, wherein he made the following Assignment of Error, again raising the federal question:

ASSIGNMENT OF ERROR

A JUDGE, WHO IS A STRANGER TO A LEGAL PROCEEDING, MAY NOT PLAY "MUSICAL BENCHES" WITH THE ASSIGNED JUDGE BY RENDERING PURPORTED JUDGMENTS IN THE MATTER, AFFECTING THE LIFE, LIBERTY OR PROPERTY OF THE LITIGANTS, WHEN THE ASSIGNED JUDGE IS AVAILABLE, NOT DISQUALIFIED AND UNDER NO LEGAL OR PHYSICAL IMPAIRMENT; AND SUCH UNLAWFUL JUDGMENTS RENDERED BY THE STRANGER JUDGE ARE VOID, A NULLITY AND OF NO LEGAL EFFECT AS BEING VIOLATIVE OF THE MANDATORY REQUIREMENTS OF:

1. Rule 4 of the Supreme Court Rules of Superintendence for the Court of Common Pleas;

2. Local Rule 15 of the Court of Common Pleas, Cuyahoga County, Ohio;

3. Rule IV(1) of the Supreme Court Rules for the Government of the Bar of Ohio;

4. Canon 2(A) and Canon 3(A)(1) and (4) of the Code of Judicial Conduct;

5. Ohio Revised Code Section 3.23;

6. Article I, Secs. 1, 2 and 16 and Article XV, Sec. 7 of the Constitution of the state of Ohio; and

7. Amendment 14, Sec. 1 of the Constitution of the United States of America.

AND AS SUCH, ALL ORDERS ISSUED HEREIN, FROM THE INCEPTION OF THIS MATTER, ARE NOT FINAL APPEALABLE ORDERS AND SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

On January 14, 1982, petitioner filed his Memorandum In Support of Jurisdiction with the Ohio Supreme Court. His Memorandum contained the above Assignment of Error verbatim as Proposition of Law No. 1, plus the following three Propositions of Law:

Proposition of Law No. 2:

WHEN THE JURISDICTION OF A COURT OF APPEALS IS CHALLENGED AT THE OUTSET BY A MOTION TO DISMISS OR ASSIGNMENT OF ERROR SETTING FORTH THE JURISDICTIONAL QUESTION, IT IS INCUMBENT UPON THE COURT AS A CONDITION PRECEDENT TO ASSUMING OR EXERCISING JURISDICTION THAT THE CONDITION PRECEDENT ISSUE ACTIVATING JURISDICTION BE RESOLVED, AND THE ASSUMPTION OR EXERCISE OF JURISDICTION WITHOUT THE

PRIOR RESOLUTION OF THE CONDITION PRECEDENT QUESTION BEING DECIDED RENDERS ANY ACTION TAKEN BY THE COURT OF APPEALS VOID FOR WANT OF JURISDICTION AND IS VIOLATIVE OF THE DUE PROCESS OF LAW PROVISION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Proposition of Law No. 3:

A COURT OF APPEALS MAY NOT, BY DECISION, ABROGATE LOCAL RULES OF THE COURT OF COMMON PLEAS OR RULES AND ETHICAL CODES PROMULGATED BY THE SUPREME COURT OF OHIO, NOR MAY THEY EXCUSE OR CONDONE VIOLATIONS THEREOF BY A TRIAL COURT: AND SUCH ACTION BY A COURT OF APPEALS IS VIOLATIVE OF LEGISLATIVE ACTION ENACTING R.C. 2301.04, CIV. R. 83, AND R.C. 3.23, AS WELL AS BEING VIOLATIVE OF ARTICLE IV, SEC. 4, ARTICLE IV, SEC. 5 (A)(1) AND ARTICLE XV, SEC. 7 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Proposition of Law No. 4:

AN OHIO COURT OF APPEALS THAT IGNORES AND AVOIDS THE DOCTRINE OF STARE DECISIS IN MATTERS INVOLVING ITS OWN PRECEDENTS, THEREBY TREATING SIMILARLY SITUATED APPELLANTS DIFFERENTLY, DENIES TO A CURRENT APPELLATE LITIGANT THE EQUAL PROTECTION OF THE LAW, GRANTS SPECIAL PRIVILEGES OR IMMUNITIES TO PRECEDING APPELLATE LITIGANTS, AND PERMITS THE TAKING OF THE CURRENT APPELLATE LIT-

IGANT'S PROPERTY BY DISPARITY OF TREATMENT ALL IN VIOLATION OF ARTICLE I, SEC. 2 AND 16 OF THE OHIO CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner's appeal was dismissed by the Supreme Court of Ohio on March 17, 1982 (A1-A2); the federal questions having been addressed by the Court of Appeals at A15 as expanded upon hereafter.

Petitioner has valiantly tried to make this Statement of Facts as simple and concise as possible, except that simple and concise events do not occur in petitioner's courtroom experiences.

ARGUMENT

Question 1

When the railroad train of events starts its run, it is a hopeless and meaningless gesture to stand in front of the engine—objecting—and attempting to push it back.

To someone who has experienced his property being taken from him illegally, it is of little distinction whether the perpetrator of the wrongdoing is wearing a black mask or a black robe—his property is still gone. The only distinction is that when the black mask takes a victim's property illegally, the government provides its police power to try and retrieve it; whereas when property is illegally taken by a black robe, the victim must use his own resources to try and recover his property.

The Supreme Court of Ohio is not reluctant to impose sanctions against attorneys who have not complied with procedural rules, but gives special immunity to judges who

have violated the rules by which they are governed and which are intended to assure justice at the trial level. In *Drake v. Bucher*, 5 Ohio St. 2d 37 (1966), the Court came down hard on an attorney who did not follow the "mechanical" requirements of the Rules of Practice of The Supreme Court of Ohio in preparing a Memorandum, while in *Vorisek v. Village of North Randall*, 64 Ohio St. 2d 62 (1980), the sanctions of dismissal were imposed upon an attorney for not following Local Appellate Rules. From those two cases the following quotes are taken:

> "There is no excuse for the failure of any member of the bar to understand or comply with the rules of this court."
>
> "To this end, our profession is commited, and adherence to our rules should be dedicated."
>
> ". . . they bespeak the dignity arising from obedience. If they are not to be obeyed, they should be done away with once for all."
>
> ". . . the line must be drawn so that Local Rules continue to be respected and the threat of sanctions continues to be an effective deterrent to the rampant disregard of those rules."

Rarely have sanctions been imposed against an Ohio judge for Rule violations, however, even though they are likewise members of the bar; bound by the Code of Professional Responsibility as well as the Code of Judicial Conduct.

In his Assignment of Error to the Court of Appeals, *supra*, petitioner charged the trial court judges who gang-jumped him with violations of the following procedural safeguards:

1. Rule 4 of the Supreme Court Rules of Superintendence for the Court of Common Pleas (mandating

that only the assigned judge can make an order) (A28).

2. Local Rule 15 of the Court of Common Pleas, Cuyahoga County, Ohio (as Sup. R. 4 and giving the Clerk exclusive control of assignment) (A32).

3. Rule IV(1) of the Supreme Court Rules for the Government of the Bar of Ohio (making the Code for Professional Responsibility and Code of Judicial Conduct binding upon all judges) (A29).

4. Canon 2(A) and Canon 3(A)(1) and (4) of the Code of Judicial Conduct (requiring a judge to respect and comply with the law, etc.) (A30 to A32).

5. Ohio Revised Code Sec. 3.23 (Oath of office requiring a judge to support the constitutions, administer justice, perform all his duties, etc.) (A30).

6. Article I, Secs. 1, 2 and 16 (A23) and Article XV, Sec. 7 (A23 and A26) of the Ohio Constitution, and

7. Amendment 14, Sec. 1 of the United States Constitution (A27).

In answer, the Court of Appeals' decision implicitly condones such action, calling it voidable only, and the litigant is struck with the unlawful taking of his property unless the offending judge or judges are called to task within 30 seconds to 30 days by motion and the expense and (constitutionally forbidden) *delay* and uncertainty of appeal. Art. I, Sec. 16 of Ohio Constitution (A33). As in *Lesher v. Kainrad, supra*, further license is now given trial judges to violate the preceding mandatory due process safeguards of a fair trial. A successful appeal remanding you to the same wrongdoers is no relief, as the cycle merely repeats itself until the litigant is exhausted, emotionally and financially.

In *In re Murchinson*, 349 U.S. 133, 136 (1955), Mr. Justice Black, speaking for the Court, said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. * * * To perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14."

The futility and frustration involved herein are a valid illustration of the accuracy of Justice Douglas' observation in *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 179 (1951) (concurring opinion):

> "It is procedure that spells out much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law."

In procedural due process matters involving non-judicial branches of government, failure of the government to follow its own duly promulgated rules and published policies has been determined to violate a citizen's right to procedural due process. *United States v. Caceres*, 440 U.S. 741, 751, n.14 (1979); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *Hollingsworth v. Balcom*, 441 F.2d 705 (6th Cir. 1971).

The Court of Appeals' Opinion herein states at A15:

> "Absent an affirmative showing of bad faith or fraud in an assignment, there is no due process issue presented by reassignments."

By virtue of the above language, the Court of Appeals did not abstain from ruling on the merits of the petitioner's federal constitutional claims on the basis of any alleged waiver. In determining the issue of waiver under state law, the Court of Appeals specifically denied the petitioner's federal constitutional claims on their merits. Since that court determined petitioner's federal constitutional claims on their merits, the untimeliness of raising the objections to the usurpation of power and illegal reassignments cannot be considered as an adequate and independent state ground, and this case is appropriate for review by this Court. *Orr v. Orr*, 440 U.S. 268, 274 (1979). The question of when and how defaults in compliance with state procedural rules can preclude this Court's consideration of a federal question is itself a federal question, *Henry v. Mississippi*, 379 U.S. 443, 447 (1965), and petitioner never knowingly and deliberately failed to raise his federal constitutional claims in the state court in the first instance.

Nor does the citing of *Mingo Junction v. Birch*, 52 Ohio App. 201 (1935) at A17, support the doctrine of "the law of the case" under the factual situation herein. In the *Mingo Junction* case, the case of *New York Life Insurance Co. v. Hosbrook*, 130 Ohio St. 101 (1935) is cited to the effect that an erroneous decision adhered to by a Court of Appeals in a second appeal does not bind the Supreme Court of Ohio upon a further appeal. That position was re-affirmed by the Ohio Supreme Court in *F. Enterprises v. Kentucky Fried Chicken Corp.*, 47 Ohio St. 2d 154, 162 (1976), and further, the *Mingo Junction* case excepts errors regarding jurisdictional issues at page 215.

Aside from the fact that a knowledgeable and intentional violation of a mandatory procedural rule is bad faith per se, that position was answered by Justice White's language in *Wood v. Strickland*, 420 U.S. 308, 321 (1975),

wherein he delineated the standard of conduct expected of a layman:

> ". . . The official himself must be acting sincerely and with the belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with the supervision of students' daily lives, than by the presence of actual malice. . . ."

If ignorance of the law is no defense for a layman charged with the responsibility of protecting the constitutional rights of others entrusted to him, then the standards expected of judicial officers should be no less. The wrong is, however, compounded when the layman or judicial officer knows the law, and deliberately violates those safeguards protecting procedural due process.

A litigant is due what is inherent in due process of law:

> ". . . the State owes to each individual that *process* which, in light of the values of a free society, can be characterized as *due* at page 380. (Emphasis added.)
>
> • • • • •
>
> Whatever residual element of substantive law the Due Process Clause may still have • • • it essentially regulates procedure." *Boddie v. Connecticut*, 401 U.S. 371, 384 (1971).

As petitioner possessed no power to select the judge adjudicating his rights, it is unfair and irrational that two classes of litigants can be created by the whim and caprice of the administrative judge; who can allow the assigned judge to sit in some instances, while being given authority by the Court of Appeals' Opinion to play "Musical Benches"

in other instances and steer the litigant to any judge he chooses without conducting a meaningful predeprivation hearing. *Logan v. Zimmerman Brush Co.*, ... U.S. ....., 71 L. Ed. 2d 265, 282, 283 (1982) (concurring opinions).

Since procedural due process rules minimize substantially unfair or mistaken deprivations of life, liberty or property by enabling persons to contest the basis upon which the state proposes to deprive them of protected interests, *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); and *Carey v. Piphus*, 435 U.S. 247, 259-260 (1978), the petitioner was denied procedural due process when he was not given a meaningful opportunity prior to the reassignment to contest said action.

The Constitution does not create property interests, but extends procedural safeguards to certain interests "that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Paul v. Davis*, 424 U.S. 693, 709-710 (1975); and *Perry v. Sindermann*, 408 U.S. 593, 602, n.7 (1972).

A "claim of entitlement" or "implicit promise" under state law, to be enforceable, must be derived from statute, legal rule, or through a mutually explicit understanding. *Perry v. Sindermann, supra*, 601-602. Unlike the factual situation in *Leis v. Flynt*, 439 U.S. 438, 442-443 (1979), there is a rule of the Ohio Supreme Court, Superintendence Rule 4 (A28), and a rule of the Court of Common Pleas, Local Rule 15 (A32), which mandate assignment of judges by lot—and implicit in the word "lot" is that such lot be public, not secret, and be conducted before the affected parties.

The petitioner herein had a "property" interest in having his case heard by the judge assigned by lot unless justifiable cause was shown to the contrary, but even then, he was entitled to procedural due process *before* his case was reassigned secretly. *Logan v. Zimmerman Brush Co., supra*, held that civil litigants are entitled to due process protections, and a party must be given a meaningful opportunity to be heard. *Boddie v. Connecticut, supra*, p. 377.

Admittedly, where there is a necessity for quick action or the impracticality of a predeprivation hearing coupled with the availability of some meaningful post-deprivation procedure, predeprivation procedures are not required. *Parratt v. Taylor*, 451 U.S. 527, 539 (1981). However, there was no necessity for quick action nor the impracticality of predeprivation procedures in the present case. Additionally, an appeal would not be an adequate remedy because of the delay involved, and because the judge's decision would be given weight in the appeal. *Goss v. Lopez*, 419 U.S. 565, 581-582 (1975).

Delay is a significant factor in assessing the due process sufficiency of an administrative procedure, *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975), and the same is true for judicial review, *Goss v. Lopez, supra*, pp. 581-582, n.10. Time is critical, because where a state's interest justifies only a post-deprivation full hearing, that hearing must be available *promptly* after the deprivation occurs. *Barry v. Barchi*, 443 U.S. 55, 72 (1979) (Brennan, J., concurring); *North Georgia Finishing Inc. v. Di-Chem*, 419 U.S. 601 (1975); and *Goldberg v. Kelley*, 397 U.S. 254, 266-267 (1970). But of most significance, Article I, Section 16 of the Ohio Constitution states, in part:

> ". . . every person, . . . shall have justice administered without denial or delay . . ."

As previously stated, the case of *Logan v. Zimmerman Brush Co., supra*, held that civil litigants are entitled to procedural due process rights. This Court has hesitated to adopt a rule that would require counsel either to exercise extraordinary vision or clairvoyance, or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. *Engle v. Isaac*, ... U.S. ....., 50 U.S.L.W. 4376, 4382 (1982). It would be unreasonable, therefore, to take the position that petitioner's original trial counsel's failure to raise petitioner's constitutional claims at the time of his divorce trial constituted a waiver of such claims by petitioner. Since petitioner's original trial counsel regularly practiced in the Cuyahoga County Court of Common Pleas, Division of Domestic Relations (whereas petitioner had an office practice) and was personally concerned about challenging or offending the illegally assigned second judge, it would be unreasonable to imagine that the petitioner himself had waived any constitutional error concerning the usurpation of authority by the second judge. Petitioner believes he has shown "cause" as to why the usurpation of authority question was not raised at his original trial, and since he was not able to obtain evidence showing fraud or bad faith, he was prejudiced by the court's denial of his procedural due process rights. *United States v. Frady*, ... U.S. ....., 50 U.S.L.W. 4388 (1982); *Engle v. Isaac, supra*. Although the foregoing cases were criminal, the principle contained therein should be applicable to the present case, as petitioner's divorce was quasi-criminal in nature in that charges must be filed of which the defendant must be found to be GUILTY and failure to comply with the court's order can result in imprisonment. *Little v. Streater*, 452 U.S. 1, 10 (1981).

The Court of Appeals' Opinion herein places great emphasis on the need for objection and the resulting

waiver of constitutional rights if objection is not made. However, in *Logan v. Zimmerman Brush Co., supra,* no mention was made of the petitioner waiving her constitutional rights by her failure to object to the scheduling of the fact finding conference beyond the required 120 day period. Forcing a litigant to object to a usurpation of power or illegal reassignment within thirty seconds is an unreasonable statute of limitations denying him the equal protection of the law. *Mills v. Habluetzel,* ..... U.S. ....., 50 U.S.L.W. 4372 (1982).

Further, compelling a litigant to appeal from a game of "Musical Benches" denys that litigant the equal protection of the law, since it unnecessarily creates a heavy financial burden as he attempts to protect his guaranteed due process rights. *Lindsey v. Normet,* 405 U.S. 56, 57 (1972). Ohio law provides a litigant with an appeal as of right to the Court of Appeals, but of what consequence is such an appeal, even if successful, when you are returned to the game-players and obliged to continue their game *ad infinitum. Lindsey v. Normet, supra,* p. 79.

The petitioner was denied due process of law and the equal protection of the law when four different judges intruded into and usurped the sole authority of the originally assigned judge. With or without objection, the consequences were always the same as the train of events relentlessly moved forward, taking petitioner's property with it, without a predetermination hearing as to why each of the four intruding judges was entitled to take a swipe at petitioner.

That the actions of the four intruding judges was void and not voidable is discussed hereafter.

Question 2

In the 1800's, there was a clear understanding between *power* (often referred to as "authority") and *jurisdiction*. By analogy, power or authority was the hand that turned on the existing jurisdiction. For example, if there were twin brothers: One a judge and the other a layman, and the judge became infirm, was secretly institutionalized, and the layman brother assumed his brother's identity. After years of posing as a judge and issuing innumerable orders, the secret was discovered. Are the orders of the imposter void or voidable? Is the imposter accountable to those whose life, liberty and property he affected, or should he be excused for knowingly intruding into and usurping the power of his brother?

In *State ex rel. Lesher v. Spinrad, et al.*, 65 Ohio St. 2d 68 (1981), counsel raised the issue of void and voidable judgments. In the Ohio Supreme Court's Opinion therein, it was not what was written in the opinion that was significant; but, rather, what was written between the lines that denoted that Court's feelings, frustrations, and reluctance to act. That case involved trial court violations of Civ. R. 53 and Civ. R. 58, and the lack of superintendence by the Ohio appellate system. As illustrated in the Statement of Facts herein, the practice continues and perpetuates, and local practitioners now accept the reality that those Civil Rules will continue to be violated, and it is purposeless to argue constitutional guarantees and the right to be tried by a judge, duly elected and sworn to duty. The first breach of a Rule that is tolerated only makes the widening of the breach easier: The first tearing of our social fabric makes each continuing rupture of the fabric easier when it is not repaired at the first opportunity, and only weakens its overall strength. There then remains the critical question of what is truly void or merely voidable—as distinguished from what is expeditiously voidable.

That question was addressed by the Ohio Supreme Court in 1846:

> "The distinction is between a lack of power *or* want of jurisdiction in the court, and a wrongful or defective execution of the power. In the first instance, all acts of the court, not having jurisdiction *or* power, are void; in the latter, voidable only. A court then may act: 1. Without power *or* jurisdiction. 2. Having power *or* jurisdiction, may exercise it wrongfully; or, 3. Irregularly. In the first instance, the act or judgment of the court is wholly void, and is as though it had not been done; the second is wrong, and must be reversed upon error; the third is irregular, and must be corrected by motion. The latter is where the power is rightfully exercised, but in an irregular way. Hence there is a vast distinction between a defect of power, a wrongful exercise of power, and an irregular exercise of power." *Paine v. Mooreland*, 15 Ohio 436, 445 (1846).

Emphasis has been added above to distinguish the early recognition of the difference between power and jurisdiction. So, in *Ives v. Choate*, 11 Ohio 511 (1842), the Ohio Supreme Court said that a judge, who no longer resided within the county of his court lacked the *power* to act as judge contrary to the constitution and statutes of the State of Ohio:

> "A person who attempts to exercise the office of associate judge in a county wherein he does not reside, is guilty of intrusion and usurpation."

Prior thereto, this Court spoke on the distinction in 1836:

> "If not warranted by the constitution or law of the land, our most solemn proceedings can confer no

right which is denied to any judicial act under colour of law, which can properly be deemed to have been done *coram non judice;* that is, by persons assuming the judicial function in the given case without lawful authority. The line which separates error in judgment from the usurpation of power is very definite; and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be declared a nullity collaterally, when it is offered in evidence in an action concerning the matter adjudicated, or purporting to have been so. In the one case, it is a record importing absolute verity; in the other, mere waste paper: there can be no middle character assigned to judicial proceedings which are irreversible for error. Such is their effect between the parties to the suit, and such are the immunities which the law affords to a plaintiff who has obtained an erroneous judgment or execution." (Syllabus and page 474 preceding language of Syllabus). *Voorhees v. The Bank of the U.S.* (10 Peters), 35 U.S. 449 (1836).

Stating the principle, but holding that the particular facts involved did not come within the principle, this Court spoke of *power* at a later date:

> "The condition upon which action by the county judge could legally be had did not exist. He, therefore, never acquired any jurisdiction, and his judgment was *coram non judice* and void." *Andes v. Ely,* 158 U.S. 312, 318 (1894).

Where a judge is charged with unprofessional conduct involving moral turpitude, and disbarment (not impeachment) proceedings are instituted against him as an attorney (not as a judge), and prior to the determination of the charges—the accused judge loses *power* to act as a judge:

". . . we have examined a great many authorities already upon this subject, and nearly all of them hold this: That where a judge undertakes to exercise the duties of a judge clearly against a provision of a statute of the state that he shall not exercise, where by the statute of the state he has no right to exercise such duties, that his acts are entirely void. I believe the rule of common law was that those acts were not void, but voidable; but where the acts are prohibited by statute, the authorities are quite numerous that those acts are entirely void, and that a judge who thus acts is not exempt from civil action, nor even from criminal action by reason of those acts—he has acted without authority;" *In Re Dellenbaugh and Burke* (8th Circuit-Cuyahoga County, 1899), 17 Ohio C.C. 106, 113.

Shepardized, the *Dellenbaugh* opinion is still the law of Ohio.

So, too, where one judge intervenes and usurps the *power* of another judge—his actions are void. The argument has been summed up very succinctly in *Slaven v. Slaven*, 35 Ohio L. Abs. 268 (1941).

The Court of Appeals' Opinion herein attempts to put the onus of responsibility on the litigants if there has been a knowing rule violation by a trial judge, instead of placing the responsibility upon the judge who has knowingly violated the rule. The litigant has not committed the wrong; the trial judge has. It is tantamount to being punished for the wrongdoing of someone else. The Opinion states that a Rule violation affecting *power* must be objected to and appealed—otherwise, it is waived. Not so in our federal court system, however, where the judge is responsible for observing his mandatory duty:

"Further, whatever logical force the waiver argument might have otherwise, we believe it is com-

pletely negated by the fact that this statute originally required one of the parties to move for disqualification * * *, but in 1948 Congress amended the statute, removing this feature entirely. * * *

As the statute now stands, the duty to disqualify is placed solely upon the District Judge.

* * * * *

. . . His disqualification is not a matter for the exercise of his own discretion, but is unconditional and absolute." *U. S. v. Amerine* (6th Cir. Ct. of App., 1969), 411 F.2d 1130.

Either the Rules of the Ohio Supreme Court and a Local Rule are "unconditional and absolute," or they are totally meaningless.

There then remains that group of cases wherein jurisdiction is activated only by the occurance of a condition precedent—as one would flick a light switch to turn on electricity. As an example, a married couple appears before a Domestic Relations judge who signs a Journal Entry granting them a divorce. He has the power and the court has the jurisdiction, but if a Complaint has not been filed, neither the power nor the jurisdiction has been triggered and the Journal Entry is void. *Spoors v. Coen*, 44 Ohio St. 497 (1886). Said in a different manner:

"For example, in a divorce case in Common Pleas Court the question may be made that the plaintiff has not been a resident of the state one year before the filing of the action. The court must then decide that question first. If residence for one year has not been established, the court has no jurisdiction to hear the case. If the necessary statutory requirement as to residence is established, then the court has jurisdiction." *State, ex rel. Bechtel v. McCabe*, 60 Ohio App. 233, 238 (1938).

When a local rule of practice was not followed, the resulting judgment was void:

> "Because the local rule of practice was not followed, the default judgment is void, and the court properly vacated that judgment." *Garvey v. Howard* (1st App. Dist. 1980), No. C-780735 Unreported.

That there is an interrelationship between procedural law and substantive law logically means that there is something more in "due process of law" than just notice and a hearing. "Due" means that a litigant is entitled to have the "process" by which his constitutional rights are determined applied equally, and that can only be accomplished by strict adherence to the mandatory rules promulgated by the legislature and the Ohio Supreme Court. Different application of mandatory rules in similar situations is not "process," which has been defined as ". . . normal or actual course of procedure . . ." BLACK'S LAW DICTIONARY, 3rd Edition; but rather, an abnormal course of procedure. A litigant is "due" what our Constitutions say he is due, and that is equality of treatment in the processing of his case.

The argument has now gone full circle and we return to the place of beginning; *In Re Dellenbaugh and Burke, supra,* for while a judge is a judge, he is also an attorney bound by the Code of Professional Responsibility as well as the Code of Judicial Conduct. Attorneys who violate rules and ethics can be disbarred, suspended, have sanctions imposed against them and their clients, and are subject to malpractice actions. On the other hand, judges who violate rules and ethics affecting a litigant's right to the enjoyment of life, liberty and property, are afforded immunity, and there are no sanctions (if that is the proper word) unless the offending judge is called to task within 30 seconds to 30 days by motion and the expense

and (constitutionally forbidden) *delay* of appeal. That attorneys who are judges have "special privileges or immunities" in violation of Article I, Sec. 2 (A23) of the Ohio Constitution, seems to argue that judges are no longer responsible as attorneys once they become judges.

The Opinion of the Court of Appeals uses frequent logical argument to arrive at an illogical conclusion; as evidenced by their citing the case of *Rosenberg v. Gattarello*, 49 Ohio App. 2d 87 (1976) (set forth at length from A11 to A13), wherein they concluded that improper reassignment and Rule violation renders any judgment null and void; while herein, such action is only voidable—neither distinguishing nor overruling *Rosenberg*.

That a violation of a clear mandatory duty deprives a trial judge of his *power* to act, and that his every action in violation of his sworn duty is void, has been the position of the Eighth Appellate District Court of Appeals in *Rosenberg, supra*, and their other reported cases:

> "The oath of office of a judge, required under Section 7, Article XV of the Ohio Constitution and specified in R.C. Sec. 3.23 provides that a judge will 'discharge and perform all the duties incumbent upon him as such judge * * *.' One of these duties is to conform his conduct to that set forth in the Code of Judicial Conduct.
>
> * * * * *
>
> In reaching this conclusion we begin with the fact that Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Canons of Judicial Ethics are 'binding' upon all judicial officers of the state.
>
> * * * * *

We further find that the attempt of a trial judge to exercise his authority as a judge in violation of his clear mandatory duty is of absolutely no effect.

* * * * *

In summary, we find that the trial judge was disqualified from exercising his office as judge in the case at bar, and that his each and every act must be declared null and void." *Cuyahoga Bd. of Mental Retardation v. Ass'n of Teachers* (8th App. Dist., 1975), 47 Ohio App. 2d 28.

During the following year, the court once again affirmed the fact that a violation of judicial duty affected the substantive rights of a litigant.

". . . recently this court has utilized the analogous Code of Judicial Conduct to establish the clear duties of a trial judge and the effect of violation upon the *substantive rights* of the parties. *Cuyahoga Co. Bd. of Mental Retardation v. Association* (1975), 47 Ohio App. 2d 28." *Swanson v. Swanson* (8th App. Dist., 1976), 48 Ohio App. 2d 85, 97 (Emphasis added.)

The *Swanson* language certainly contrasts with the current Opinion language saying that a violation of a judicial duty does not affect substantive rights.

Prior argument was made that there was no special solicitude due in a criminal action as contrasted with a civil action; but it is the Ohio Supreme Court's position that special consideration is due in a divorce proceeding, as contrasted with all other actions, as the State of Ohio is a silent party litigant in all divorce proceedings, and such proceedings must be scrutinized for Rule violations that affect not only the substantive rights of the litigants, but the rights of the State of Ohio, *Van DeRyt v. Van DeRyt*, 6 Ohio St. 2d 31 (1966).

This petitioner does not feel that he is making an unreasonable demand when all he asks is that he be afforded the same equality of treatment given to the litigants in the four foregoing precedent cases.

The Opinion of the Court of Appeals herein (A3-A17) is not workable, as reassignments will continue to be made by whim or caprice even if they do state an undefined "justifiable reason" in a journal entry, and usurpation of power will continue without immediate relief or sanctions for the affected litigant.

The condonation of unlawfulness resolves nothing.

CONCLUSION

In our system of government, with checks and balances, there is an implicit promise in our Constitution that there should be accountability, redress and recourse. This petitioner does not approach the Court as a kid brother asking his older brother to fight for him; rather, he only asks that his hands be untied so that he can conduct his own fight.

Alexander Hamilton in THE FEDERALIST (1787-1788) stated:

> "Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience."

By virtue of the trial court practice of notoriously defying mandatory rules, and the condonation thereof by the Ohio appellate system, two classes of litigants are created in the unlawful administration of a litigant's property interests as established by Ohio law: One class

entitled to have their constitutional rights as to their enjoyment of life, liberty and property determined by an assigned judge selected by public lot, and a second class that can arbitrarily be steered to a trial judge by the whim or caprice of an administrative judge without any procedural due process rights being afforded prior to reassignment, and with inadequate due process rights after the reassignment. Included therein is the problem of illegal, arbitrary and capricious actions by state trial courts with no immediate relief available to the affected litigant.

Accordingly, petitioner seeks succor from having to return, unarmed, to the trial court to be whirled around again for a third time by "revolving door justice."

Petitioner feels that somewhere between *Stump v. Sparkman*, 435 U.S. 349 (1978) and *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719 (1980), there is a void that has not been addressed by this Court. It is that moment in time when a trial judge knowingly violates a governing rule or statute that permits him to exercise his power as a judge; for at that precise moment, disparity of treatment comes into play in violation of the Equal Protection Clause of the Fourteenth Amendment. To, thereafter, compel a litigant to go through the charade and expense of a mock trial, pursue the delay and expense of appeal, or try to obtain injunctive or extraordinary writ relief places an unfair burden on a litigant to try to return to the place of beginning where the Constitution guaranteed him a fair trial in the first instance. The situation differs from an instance wherein a trial judge exercises his discretion in determining whether some event occurring during trial warrants a mistrial, as power and jurisdiction continue—and the decision of the court is a judgment call. In athletics, there is a distinction between "judgment calls" and "rule violations." Judgment calls

(procedural irregularities) cannot be protested, but rule violations can result in forfeiture of the game, and *Stump, supra*, was in agreement to that extent when it set down the immunity limitation that:

> ". . . there being no state statute or case law prohibiting the state court . . ."

Based upon past experience, petitioner is satisfied that protest to an intimidated Grievance Committee of a Bar Association or an Affidavit of Disqualification filed with the Chief Justice of the Ohio Supreme Court is time consuming and non-productive, as relief is rarely afforded, and when afforded is untimely and after the fact.

Extensive thought and research has been given in an attempt to define the federal questions involved, and petitioner urges this Court to grant the writ of certiorari sought by him, so that he can brief possible answers to the problems presented. In doing so, this Court will have an opportunity to rectify continuing injustices and provide working solutions for these difficult and delicate problems which currently beset the administration of justice in our state courts.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO DISMISSING THE APPEAL

(Dated March 17, 1982)

No. 82-34

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal as of right from the Court of Appeals for CUYAHOGA County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

ORDER OF THE SUPREME COURT OF OHIO SUSTAINING MOTION TO DISMISS

(Dated March 17, 1982)

No. 82-34

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER,
Appellant.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD ON MOTION TO DISMISS

It is ordered by the Court that this motion to dismiss be sustained.

JOURNAL ENTRY AND OPINION OF THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO

Nos. 43365, 43501, 43502 and 43503

(Dated October 22, 1981)

COURT OF APPEALS OF OHIO
EIGHTH DISTRICT
COUNTY OF CUYAHOGA

Case No. 43365

BERTINE M. BERGER,
Appellant,

vs.

SANFORD J. BERGER, *et al.*,
Appellee,

Cases Nos. 43501, 43502 and 43503

BERTINE M. BERGER,
Appellee,

vs.

SANFORD J. BERGER,
Appellant.

JOURNAL ENTRY AND OPINION

MARKUS, *J.*:

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under re-

view, and judgments of said Common Pleas Court are reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

SEE OPINION, MARKUS, J., INCORPORATED HEREIN AND MADE A PART HEREOF.

No other error appearing in the record, this case is remanded to the Common Pleas Court for further proceedings consistent with this journal entry.

It is ordered that:

Sanford Berger recover costs herein taxed from Bertine Berger in Cases Nos. 43365, 43501, 43502 and 43503.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ RICHARD M. MARKUS
Judge

PRYATEL, *P.J.* and
PATTON, *J.* concur.

SYLLABUS:

1. In a multi-judge division of the Common Pleas Court, Superintendence Rule 4 requires that each case be assigned by lot to a specific judge of that court who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination.

2. The administrative judge for a multi-judge division of the Common Pleas Court has authority to determine

preliminary matters in the case when the assigned judge is unavailable or to reassign any case to himself or any other judge of that court, by a journalized order stating a justifiable reason for transferring responsibility for the case to himself or to another judge.

3. Absent a journalized order by the administrative judge for a multi-judge division of the Common Pleas Court explaining the need for his action on a preliminary matter in a case assigned to another judge or transferring the case from the assigned judge to himself or another judge, any other judge assuming to act has no authority and his rulings are voidable on timely objection by any party.

4. Failure by a party to assert on the record an objection to reassignment at that party's first opportunity to do so constitutes a waiver of that party's objection to the otherwise voidable transfer and bars that party from complaining at a later time that the judge acting in place of the assigned judge lacked authority to so act.

MARKUS, J.:

These consolidated appeals concern rulings by judges in a multi-judge court who were not originally assigned to the case under local rules implementing the Rules of Superintendence for Common Pleas Courts. In this case four different judges of the same court were apparently assigned or acted at various stages of its development. The record does not show which of these judges may have been the administrative judge at the time rulings were made. We hold that where the record fails to show proper reassignments of the case to the judges making those rulings, they are voidable and must be vacated on a timely motion or appeal by a party that has not waived his objection to such irregularity.

The present appeals arise from post-judgment motions in a divorce action originally assigned for hearing by a specific judge of the Domestic Relations Division. Presumably that original assignment was accomplished by lot, drawing a card from a sealed deck designed to prevent advance knowledge of the judge selected, as prescribed by Cuyahoga County Common Pleas Local Rule 15:

"15. ASSIGNMENT OF CIVIL CASES FOR TRIAL

"(A) All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the deck is unknown until the card is drawn.

"(B) It shall be the duty of the individual judge to handle all court activity, including motions and emergency matters, status hearings, and pretrials, trials, etc. associated with the cases assigned to him."

That procedure conforms with the requirements of Superintendence Rule 4:[1]

"RULE 4. ASSIGNMENT SYSTEM

"For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in, or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case un-

1. While this case concerns procedures in Common Pleas Courts, it may be appropriate to note that similar assignments are required by Rule 3(B) of the Rules of Superintendence for Municipal Courts and County Courts.

til its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

"Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition."

Twenty-one months after the original assignment, a second judge of the same court granted a divorce to the plaintiff-wife and made orders for alimony and division of property. The record does not show any journal entry or other order transferring the case from the original assigned judge to the second judge. On defendant's appeal to this Court, the trial court's judgment was affirmed in all respects relevant here. Further review was denied by the Ohio Supreme Court and the United States Supreme Court. The record does not show any objection by any party to the transfer of the case prior to the decision of the second judge, nor was the case assignment claimed to be error in the appeal.

While the appeal was pending, the plaintiff-wife sought a contempt order in the trial court for alleged noncompliance by the defendant-husband with the divorce decree. An order finding defendant in contempt was made by the second judge. At that time there was still no order transferring the case to the second judge, nor does the record reflect any contemporaneous objection by any party to that continued informal reassignment. Since no sanction resulted from that post-judgment order by the second judge, it seemingly had no prejudicial effect on either party.

Nineteen months after this court affirmed the divorce judgment, a third judge of the same trial court referred outstanding motions to enforce the judgment to a court referee. Shortly before that referral, defendant had filed two memoranda on those motions, with a caption showing the case assigned to the second judge, and neither of those documents complained about the case assignment.

However, when the matter came before the referee, the transcript shows that defendant objected vigorously to the referral by the third judge and any potential report to the third judge, on the express ground that only the original assigned judge had authority to act on the case. In that hearing defendant objected to all past and future action on the case by any judge other than the original assigned judge. In so doing, defendant repeatedly noted that no valid transfer order had been made and that the court records still showed the case assigned to the original judge.

The trial court's referee reported his findings in writing. Defendant then filed objections to that report and a motion under Civ. R. 60(B) to vacate the second judge's divorce judgment and contempt order entered three years earlier. In each document defendant argued that only the original assigned judge had authority to act. The third judge accepted the referee's report, overruled defendant's objections, and denied defendant's motion to vacate the second judge's orders. The third judge then granted plaintiff a judgment for unreimbursed medical expenses but denied plaintiff's motion that defendant be punished for failing to return certain antiques.

Plaintiff now appeals to this Court from that latter order, urging that denial of that relief was erroneous because the evidence was "sufficient" to establish plaintiff's right to the order against her former husband, and because

she should have been given an additional opportunity to rebut surprising testimony by her husband.[2]

After plaintiff's notice of appeal was filed, three additional orders were made in this case. *Sua sponte* and without specifying any reason for his action, the administrative judge journalized an order transferring the case to a fourth judge of the same trial court. Two days later the fourth judge issued two orders which repeated the rulings made by the third judge one month earlier. Those two repeat orders denied defendant's motion under Civ. R. 60(B) to vacate the second judge's orders, and granted in part and denied in part plaintiff's motions for sanctions against the defendant. Defendant then filed his notices of appeal from those three orders by the administrative judge and the fourth judge. Defendant's three appeals and plaintiff's appeal have been consolidated for joint consideration and disposition.

Defendant's single claimed error challenges the multiple assignments of his case and the authority of successive judges to make rulings. We note that the three rulings from which defendant appeals may be invalid on the alternative ground that they were made when the plaintiff's appeal was pending. *Vavrina v. Greczanik* (1974), 40 Ohio App. 2d 129; *Cuyahoga Co. Bd. of Mental Retardation v. Association* (1975), 47 Ohio App. 2d 28. However, we will consider the error raised by defendant.

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2. In view of our conclusion that the third judge lacked authority to make such orders, we need not consider those claimed errors. However, if the third judge did have power to make those rulings, the claimed errors would not justify reversal since they concern the weight given to conflicting testimony and the discretion applied in directing orderly proceedings. Our review of the record shows that the third judge would have been justified in his placement of the burden of proof, his weighing of the witness' credibility, and his apparent conclusion that the husband's testimony was not sufficiently surprising to merit a new hearing.

First, it is also argued as defendant's response to plaintiff's appeal. Second, the plaintiff's appeal may have challenged an order made by a judge lacking jurisdiction, and such an appeal may not prevent a trial court with proper jurisdiction from acting to correct that error. *See* 4A C.J.S. Appeal and Error, §616, p. 409, n. 4. Further an examination of defendant's claimed error is necessary to provide guidance for further proceedings on remand of this action.

Superintendence Rule 4, quoted earlier, clearly seeks to restrict case assignments in a manner that will eliminate whimsical transfers. All cases in a multi-judge court must be assigned by lot, and the assigned judge must be responsible for all substantive action on the case. Presumably that rule is intended to divide the court's responsibility in an equitable manner among the member judges, to make the respective members accountable, and to ensure an orderly disposition of the case by a judge who develops cumulative familiarity with the case. Even more significantly, restrictions on discretionary case assignments or transfers serve to inhibit real or perceived "judge shopping" and judicial favoritism.

Constitutional authority for the Supreme Court's power to establish that regulation flows from Article IV, Section 5(A)(1) of the Ohio Constitution:

> "5 [Additional powers of supreme court; supervision; rule making.]
>
> "(A)(1) In addition to all other power vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court."

The Superintendence Rules are binding on the courts so long as they are consistent with statutes and other governing court rules. The limitations on case assignments and transfers are derived from Superintendence Rule 4, rather than any constitutional or statutory language. Before adoption of that rule, each local court arranged case assignments and transfers in any manner that seemed practical to the judges in that court.

Superintendence Rule 4 should not be read to mean that a case can never be transferred from the original assigned judge, nor that only the original assigned judge has authority to take action under any circumstances. The rule itself authorizes action on "preliminary matters, including requests for continuances" by the administrative judge of that court if the original assigned judge is "unavailable." But that authority should not be exercised by the administrative judge without a record notation of the need for action by the administrative judge in the place of the assigned judge.

Thus, in *Rosenberg v. Gattarello* (1976), 49 Ohio App. 2d 87, this Court ruled that the administrative judge lacked authority to grant leave for the filing of an untimely compulsory counterclaim, without a record showing why the assigned judge was unavailable and why there was need for action during the anticipated unavailability:

> "We now turn to the first issue of whether or not the administrative judge of a division of a common pleas court has authority to rule on preliminary matters in a case assigned to a trial judge under the personal docket system. The appellant argues that through custom and usage the administrative judge here had concurrent authority with the assigned judge to grant his motion for leave to file an untimely counterclaim. This argument is not valid. Ohio courts

are governed not by custom and usage but by the Rules of Superintendence of the Ohio Supreme Court promulgated under authority of the Ohio Constitution, Article IV, Section 5. Under the facts in this case, we hold that the administrative judge did not have authority to rule on the motion for leave under Civil Rule 13(F).

The *Rosenberg* decision further describes the administrative judge's authority:

"The administrative judge merely has authority and responsibility for and control over the administration, docket and calendar of the division. He does not have authority and responsibility for determining issues and proceedings in cases. These must be submitted for disposition to the judge to whom the case has been assigned with the exception of preliminary matters where the trial judge is unavailable and a delay in ruling on the matters until he is available would be prejudicial.

"The movant before the administrative judge has an affirmative duty to demonstrate in the record that the assigned judge is not available to rule on said matter and that a delay in ruling until he his [sic] available would be prejudicial. This condition precedent must be complied with before the administrative judge has authority to rule on any preliminary matter. Until a showing of unavailability is made, the assigned judge has the exclusive authority to rule on preliminary matters.

"The record in this case does not demonstrate that the assigned judge was unavailable to rule on the motion for leave to file a counterclaim, nor does it show that a delay in ruling until the trial judge

was available would have been prejudicial. Consequently, since the administrative judge did not have authority to grant the motion, the order granting said motion was null and void."

Additionally, case transfers after a trial is commenced or concluded are governed by Civil Rule 63 and Criminal Rule 25, each of which derives its constitutional base from Article IV, Section 5(B) of the Ohio Constitution. That Civil Rule and that Criminal Rule allow the administrative judge, or the Chief Justice of the Ohio Supreme Court in the instance of a single-judge division, to designate a replacement judge when the assigned judge "is unable to proceed with the trial" or is "unable to perform the duties of the court after a verdict." Here again, reassignment is permitted only where there is a record showing of the assigned judge's inability to act.

Thus, in *Beatty v. Alston* (1975), 43 Ohio St. 2d 126, the Supreme Court ruled that sentence could not be imposed by a judge other than the assigned judge who presided over the trial unless the assigned judge is shown to be unable to act:

> "This rule inferentially commands that unless unable to do so, the judge who presided at a criminal trial must also preside at post-conviction proceedings, including sentencing."

Therefore, the Court held in *Beatty* that the assigned judge, who was available when another judge sentenced the defendant, acted properly by vacating that sentence and imposing his own harsher penalty. By contrast, this Court ruled in *State v. Blythewood* (1978), 60 Ohio App. 2d 300, that the administrative judge could designate himself to rule on a shock probation motion, where the assigned judge who accepted a guilty plea and imposed

sentence was shown on the record to be ill and unavailable for timely action on the motion.

In addition to the previously stated authority for case transfers, Superintendence Rule 3(B) impliedly permits the administrative judge to make case reassignments for good cause:

> "RULE 3. ADMINISTRATIVE JUDGE
>
> "(B) *Powers.* The administrative judge shall be the presiding officer of his division and *shall have full responsibility for and control over the administration, docket and calendar of the division which he serves. He shall cause cases to be assigned to the judges within the division* and shall require such reports from each judge concerning the status of assigned cases as he may require *to assist him in discharging his overall responsibility for the observance of these superintendence rules and for the termination of cases in his division without undue delay.*" (Emphasis added)

There are many circumstances in which reassignment is appropriate, if not essential, in the interest of justice. Those situations include the recusal or disqualification of the assigned judge, protracted illness or absence of the assigned judge, exigent circumstances created by temporary absence or docket congestion for the assigned judge and an immediate need for action in the case.

However, the administrative judge's broad power of docket control and case assignment in Superintendence Rule 3 must be read together with the Assignment System prescribed by Superintendence Rule 4 and the related provisions in Civil Rule 63 and Criminal Rule 25. In view of the language of those rules and earlier case inter-

pretations, we hold that reassignment of any case must be accompanied by a journal entry executed by the administrative judge which states a justifiable reason for transferring responsibility for the case to another judge.[3] Absent such an entry, the judge assuming to act has no authority and his rulings are voidable on timely objection by any party.

While at least one earlier decision described defective rulings resulting from unauthorized assignments as void, we believe they are more properly considered as voidable.[4] Absent an affirmative showing of bad faith or fraud in an assignment, there is no due process issue presented by reassignments. Rather, transfers violate governing procedural rules if the record does not show they have been made by the proper authority with a proper reason.

Like other procedural irregularities, their impropriety must be asserted in a timely fashion, or any objection is waived. Compare, e.g., Evid. R. 103 (evidentiary objections required), Civ. R. 51(A) (objection to civil jury charge required), Crim. R. 30 (objection to criminal jury charge required). A party cannot await the decision with knowledge of the procedural irregularity before choosing to object to the defect if the decision is unfavorable.

The waivable nature of error based on irregular transfers of the case was specifically applied in *Bowman v. Ohio* (1950), 88 Ohio App. 229. In that criminal case, a new judge was substituted in the middle of the trial when the original trial judge became ill, but the original

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3. When the administrative judge is himself unavailable, there may well be a valid local procedure for a designated acting administrative judge to act on such matters.

4. The attempted exercise of jurisdiction by someone who was not authorized to act as a judge in any circumstances might well constitute void action. However, all persons acting here were regularly serving as qualified judges of that court.

judge decided a motion for new trial after recovering from that illness. The record did not show that either judge was familiar with details of the part of the trial conducted by the other judge. Although the record did not show express consent by the defendant to those substitutions, the record failed to show any objection. Therefore, the appellate court concluded at 88 Ohio App. 229, 232:

> "In the absence of an affirmative showing to the contrary, it may be presumed that the accused consented to the substitution of judges by the continuation of the trial to its completion."

See also People v. Casselman (1909), 10 Cal. App. 234, 101 Pac. 693; *Burrage v. State* (1912), 101 Miss. 598, 58 So. 217; *People v. Henderson*, (1865), 28 Cal. 465.

Citing *United States v. Valante* (1924), 264 U.S. 563, the Ohio court ruled in *Bowman*, at 88 Ohio App. 229, 236:

> ". . . if any error existed in the substitution of one judge for another, such substitution did not go to the jurisdiction of the court or render the judgment void and that review should have been sought by writ of error, and that a remedy by habeas corpus is not available."

Certainly, the procedural infirmity from improper case assignment has less constitutional concern in civil than in criminal cases.

Therefore, any party objecting to reassignment must raise that objection at the first opportunity to do so. If the party has knowledge of the transfer with sufficient time to object before the new judge takes any action, that party waives any objection to the transfer by failing to raise that issue on the record before the action is taken.

If the party first learns about the transfer after action is taken by the new judge, the party waives any objection to the transfer by failing to raise that issue within a reasonable time thereafter. The definition of a reasonable time may well be controlled by time limits for motions for rehearing, reconsideration, or a new trial.

Applying these precepts to the present case we observe that none of the reassignments from the original assigned judge are justified by the record. There was no record entry of a transfer to the second or third judges, and no reason was given for the record entry transferring the case to the fourth judge. However, there was no timely objection to the transfer to the second judge or his consideration of any issues. Indeed, the second judge's divorce judgment was the subject of an appeal to this Court without any challenge to his authority to hear and decide the issues. Therefore, the validity of this divorce judgment is the law of the case, even if any objection to that judge's individual authority to act on that matter had not been waived long ago. *Mingo Junction v. Birch* (1935), 52 Ohio App. 201. Having failed to claim that error in the first appeal, defendant waived that error for that appeal and any subsequent appeal based on the same record.

The motions which are the subject of these appeals should be decided by the original assigned judge unless the administrative judge transfers the case for a sound reason and evidences that action by a proper journal entry. The case is therefore remanded for further proceedings consistent with this opinion at the costs of Bertine M. Berger.

PRYATEL, *P.J.* and PATTON, *J.* concur.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS

(Dated December 11, 1980)

CUYAHOGA COUNTY

Case No. D 68055

BERTINE M. BERGER,
Plaintiff,

vs.

SANFORD J. BERGER,
Defendant.

JOURNAL ENTRY

This matter came to be heard on October 30, 1980 upon the motion to show cause #7114 & 11802 filed by plaintiff and appearances were made by plaintiff appearing with counsel; defendant representing himself with co-counsel Robert Furtell.

The Court finds that service upon said motion was duly and properly made and the facts and conclusions of law are as stated in the following recommended entry.

The Court being fully advised in the premises and having received the report and recommendation of the Referee, finds that a copy of the Referee's report was filed and delivered to both parties or their counsel on 11-13-80.

A copy was mailed to Richard Eisenberg, Atty.; Sanford J. Berger 6809 Mayfield Rd. Mayfield Hts., Ohio; Robert Furtell

Objections were filed thereto in accordance with the provisions of Rule 75 of the Ohio Rules of Civil Procedure. The Court, upon review, finds that said recommendation is fair, just and reasonable and approves the same.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED

That the plaintiff's motion to show cause #7114 be denied. That a judgment be rendered for the plaintiff against the defendant in the amount $1,758.83 together with interest from September 23, 1977 at the rate of 8% per annum for which execution may issue.

that in the event it is made to appear to the Court within one year by affidavit or by the report of the Department of Domestic Relations that the above order of the Court is not being complied with, a citation shall immediately issue for the said ..... without further notice, requiring him to appear instanter to show cause why he should not be punished for contempt.

Costs adjudged against defendant.

/s/ JAMES CELEBREZZE
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS

(Filed January 14, 1981)

No. D 68055

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

BERTINE M. BERGER
Plaintiff

v.

SANFORD J. BERGER
Defendant

JOURNAL ENTRY

This cause is hereby reassigned to the Honorable Patrick F. Gallagher.

/s/ JAMES D. SWEENEY
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS

(Dated January 21, 1981)

No. D 68055

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, CUYAHOGA COUNTY

BERTINE M. BERGER,
Plaintiff,

v.

SANFORD J. BERGER,
Defendant.

JOURNAL ENTRY

On November 29, 1980, defendant filed Motion to vacate judgment under Civ.Rule 60(B) with brief (#35062).

On December 15, 1980, defendant filed Motion for Stay of execution in conjunction with Motion to vacate judgment (#35560).

Without a hearing, defendant's motion to vacate judgment under Civ.Rule 60(B) with brief (35062) and defendant's motion for stay of execution in conjunction with motion to vacate judgment (35560) are hereby OVERRULED.

/s/ PATRICK F. GALLAGHER
Judge

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS, DIVISION OF DOMESTIC RELATIONS

(Dated January 30, 1981)

Case No. D 68055

IN THE COURT OF COMMON PLEAS
DIVISION OF DOMESTIC RELATIONS
CUYAHOGA COUNTY, OHIO

BERTINE M. BERGER,
Plaintiff,

VS.

SANFORD J. BERGER,
Defendant.

JUDGMENT ENTRY

This matter having been reassigned to the Honorable Patrick F. Gallagher, said Judge Gallagher has reviewed the objections filed by counsel for the respective parties.

Without a hearing the objections are hereby overruled. Report of Referee is hereby OVERRULED.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Motion to show Cause No. 7114 be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff's Motion to show cause No. 11802 be GRANTED and that judgment be rendered for plaintiff against the defendant in the amount of $1,758.83 together with interest from September 23, 1977 at the rate of 8% per annum for which execution may issue.

/s/ PATRICK F. GALLAGHER
Judge

OHIO CONSTITUTION

Article I

§ 1 Inalienable rights

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possession, and protecting property, and seeking and obtaining happiness and safety.

§ 2 Where political power vested; special privileges

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly.

§ 16 Redress in courts

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

[Suits against the state.] Suits may be brought against the state, in such courts and in such manner, as may be provided by law. (As amended September 3, 1912.)

Article IV

§ 4 Common pleas court

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the

probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts. (Amended, effective Nov. 6, 1973; SJR No. 30. Adopted May 7, 1968. Former § 4 repealed.)

§ 5 Powers and duties of supreme court; administrative director; rules

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state,

which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

Article XV

§ 7 Oath of officers

Every person chosen or appointed to any office under this state, before entering upon the discharge of its duties, shall take an oath or affirmation, to support the Constitution of the United States, and of this state, and also an oath of office.

UNITED STATES CONSTITUTION

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PREFACE TO RULES OF SUPERINTENDENCE, COMMON PLEAS COURTS

RULES OF SUPERINTENDENCE
PREFACE

Delay in both criminal and civil cases in the trial courts of Ohio is always a serious problem in the administration of justice. It is to be remembered that the courts are created not for the convenience or benefit of the judges and lawyers, but to serve the litigants and the interests of the public at large. When cases are unnecessarily delayed, the confidence of all people in the judicial system suffers. The confidence of the people in the ability of our system of government to achieve liberty and justice under law for all is the foundation upon which the American system of government is built.

The following rules are designed (1) to expedite the disposition of both criminal and civil cases in the trial

courts of this state, while at the same time safeguarding the inalienable rights of litigants to the just processing of their causes; and (2) to serve that public interest which mandates the prompt disposition of all cases before the courts.

Rule 1

APPLICABILITY; AUTHORITY; CITATION

(A) Applicability. These rules of Superintendence are applicable to all courts of common pleas in this state.

(B) Authority. These rules are promulgated pursuant to Section 5 (A)(1) of Article IV of the Ohio Constitution.

Rule 4

ASSIGNMENT SYSTEM

For the purpose of these rules, the individual assignment system is that system whereby, upon the filing in, or transfer to, a division of the court of a civil case, or upon arraignment in a criminal case, a case is immediately assigned by lot to a judge thereof, who thus becomes primarily responsible for the determination of every issue and proceeding in the case until its termination. Under such system, all preliminary matters, including requests for continuances, must be submitted for disposition to the judge to whom the case has been assigned, or if he is unavailable to the administrative judge.

Each multi-judge general division of each court of common pleas shall adopt the individual assignment system as defined herein for the assignment of all cases to judges of the division for disposition.

Amended August 13, 1979.

GOVERNMENT OF THE BAR

Rule IV

PROFESSIONAL RESPONSIBILITY AND JUDICIAL ETHICS

(1) The Code of Professional Responsibility, as adopted by this Court on October 5, 1970, and set forth in 23 Ohio State 2d Reports, shall be binding upon all persons admitted to practice law in the state of Ohio, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. The Code of Judicial Conduct, as adopted by this Court on December 20, 1973, and set forth in 36 Ohio State 2d Reports, shall be binding upon all judicial officers of this state, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V, or by retirement, removal or suspension from office, as provided in Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

(2) It is the duty of the lawyer to maintain towards the Courts a respectful attitude, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

Amended July 15, 1974.

OHIO REVISED CODE

§ 3.23 Oath of office of judges and other officers. (GC § 3)

The oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding. The oath of office of every other officer, deputy, or clerk shall be to support the constitution of the United States and the constitution of this state, and faithfully to discharge the duties of his office.

CODE OF JUDICIAL CONDUCT

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that

promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the Judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

LOCAL RULE 15, COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

15. ASSIGNMENT OF CIVIL CASES FOR TRIAL

(A) All civil cases shall be assigned to a judge by drawing a card from a sealed deck handled by the Clerk under the supervision of the Court Administrator. The deck shall be constructed so as to insure that the identity of the next judge name in the deck is unknown until the card is drawn.

(B) It shall be the duty of the individual judge to handle all court activity, including motions and emergency matters, status hearings, pretrials, trials etc. associated with the cases assigned to him.

* * * * *